United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 16, 2004

TO : Celeste Mattina, Regional Director
Region 2

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Bricklayers Local 1 (Richardson & Lucas)
Case 2-CP-1039-1

This case was submitted for advice as to whether the Union's use of inflated rat and Uncle Sam balloons while handbilling was picketing in violation of Section 8(b)(7)(A). We conclude that the Region should dismiss the charge absent withdrawal.

FACTS

The Employer is an exterior restoration contractor performing roofing, waterproofing, sheet metal, brick and stone work in the New York City area. It has been party to a collective bargaining agreement with Local 522, IBT, for almost 40 years. The collective bargaining agreement between Local 522 and the Employer extends recognition to Local 522 as the Section 9(a) representative. Bricklayers and Allied Craftworkers Local 1 (the Union) represents employees who perform masonry work in the New York City area.

The Employer is currently performing brick masonry façade work and restoration at a residential building located at 700 Columbus Avenue in New York City. On October 17, 2003, the Union commenced handbilling at the jobsite entrance. The handbilling continued on various days until November 23. At most times, the Union handbilled alongside a large, inflated rat balloon. Sometimes the Union used an inflated Uncle Sam balloon in addition to, or instead of, the rat balloon. On some occasions, the Union handbilled without either balloon.

The handbilling conduct consisted of two individuals standing in place and distributing handbills, without patrolling and without blocking the entrance. There was no shouting, chanting, or other noise making. There generally was no display of Union insignia.[1] There is no evidence

[1] [*FOIA Exemptions 6, 7(c) and 7(d)*

that the Union tried to prevent deliveries from being made or encouraged employees not to perform their work.[2]

The Union initially utilized a handbill which stated that:

TO THE PUBLIC

RICHARDSON & LUCAS

DOES NOT HAVE A COLLECTIVE BARGAINING AGREEMENT WITH THE BRICKLAYERS & ALLIED CRAFTWORKERS LOCAL UNION NO. 1, NEW YORK, POINTERS, CLEANERS & CAULKERS, AFL-CIO

This activity is not intended to induce any individual employed by any other person in the course of his/her employment, not to pick-up, deliver or transport any goods, or not to perform any service.

IF YOU HAVE ANY QUESTIONS PLEASE FEEL FREE TO CONTACT BAC LOCAL #1 AT 718-392-0525.

At some point, the Union stopped using that handbill and began using a handbill which stated that:

TO THE PUBLIC

RICHARDSON AND LUCAS

DOES NOT PAY AREA STANDARD WAGES FOR BRICKLAYERS & ALLIED CRAFTWORKERS LOCAL UNION NO. 1, NEW YORK CITY & LONG ISLAND BAC

This activity is not intended to induce any individual employed by any other person in the course of his/her employment, not to pick-up, deliver or transport any goods, or not to perform any service.

IF YOU HAVE ANY QUESTIONS PLEASE FEEL FREE TO CONTACT BAC LOCAL #1 AT 718-392-0525.

On October 20, shortly after the handbilling began, Union President Lanzafame wrote to the Employer to request

---

.]

[2] [*FOIA Exemptions 6, 7(c) and 7(d)*

.]

information about the wages and benefits paid to its employees. The letter stated that the Union believed the wage and benefit contributions for the Employer's employees performing masonry work were "substantially below" the "standard prevailing monetary package of $49.70" per hour provided in the Union's collective bargaining agreement. The letter further stated that "Local 1 intends to inform the public that your employees receive substandard wages and benefits and to seek to eliminate through peaceful, First Amendment protected handbilling this threat to the area standards." The letter also stated that such handbilling "does not have an organizational or recognitional objective." The letter then stated that:

> If our information as to the wages and benefit contributions you pay is erroneous and you in fact pay a wage package that substantially matches the prevailing scale, please advise us immediately, with appropriate supporting evidence. Similarly, if you change your scale so that your wages and benefits substantially match the prevailing standard, please advise us. In the absence of such advice, we intend to advise the public that your employees receive substandard wages and benefit contributions.

The Employer did not respond to this letter.

[*FOIA Exemptions 6, 7(c) and 7(d)*

.]

ACTION

We conclude that the Region should dismiss the charge absent withdrawal.

The Region has concluded that at least part of the Union's object in engaging in this conduct was recognitional or organizational. Therefore, since the Employer had a Section 9(a) relationship with Local 522, the Union's conduct would violate Section 8(b)(7)(A) if it was tantamount to picketing.

As we have concluded in considering allegations of similar Section 8(b)(4) conduct, the Union's use of a large inflated rat could be viewed as not merely First Amendment protected speech but also confrontational conduct intended to induce employees to withhold services or persuade third persons not to do business with these establishments.[3] Thus, a rat is a well-known symbol of a labor dispute and could constitute a signal to third persons that there is an invisible picket line they should not cross.[4] Arguably, therefore, the Union's conduct here violated Section 8(b)(7)(A) on the theory that it was not merely handbilling but was tantamount to picketing of an employer that has a Section 9(a) relationship with another union.

However, this case is not a good vehicle to assert that novel theory. First, the evidence of organizational or recognitional object here is equivocal. Although the Union's initial handbill announced that the Employer "does not have a collective bargaining agreement with the [Union]," the more recent handbilling had an area standards message and the Union sent a detailed letter to the Employer seeking wage and benefit information and declaring its area standards concerns. The only other evidence of organizational/recognitional object is the statement Gozdyra acknowledges he made to a tenant that "the Union wanted all

---

[3] DeBartolo II, above, 485 U.S. at 580, citing Safeco, above, 447 U.S. at 619. See Sheet Metal Workers Local 15 (Brandon Regional Hospital), Case 12-CC-1258, Advice Memorandum dated April 4, 2003.

[4] For a more complete discussion of such a theory of violation, see Bricklayers Local 1 (Yates Restoration Group, Ltd.), Case 2-CC-2594, Advice Memorandum dated January 12, 2004. Although, as the Region points out, the inflated rat balloon could constitute "symbolic speech," and the Supreme Court has afforded constitutional protection to such speech in various non-labor contexts, it has yet to extend this protection to expressive activity implicating Section 8(b)(4) or (7) considerations. Thus, there is no basis in current law to conclude that an inflated rat would be regarded as constitutionally protected symbolic speech even if it were the equivalent of picketing which the Act clearly prohibits. Operating Engineers Local 150 v. Village of Orland Park, 139 F. Supp.2d 950 (N.D. Ill. 2001), in which the court found that an inflated rat was symbolic speech entitled to First Amendment protection, is not instructive here because the union was engaged in lawful primary picketing and the 42 U.S.C. § 1983 claim did not require an analysis of the tension between First Amendment guarantees and Section 8(b) prohibitions.

contractors to be members but were there protesting area standards" and the testimony of an Employer foreman that on one occasion a handbiller invited him to join the Union.

Second, the Union did not consistently utilize a rat balloon in its handbilling activity. On some days, it engaged in pure handbilling, which clearly was protected speech activity under De Bartolo. On other days, it utilized an Uncle Sam balloon, which did not transform otherwise lawful Union handbilling into conduct that violated Section 8(b)(7)(A); unlike a rat, Uncle Sam has no historical significance in a labor context and thus could not signal employees or passersby that there is a labor dispute and that they should not cross the "picket line."[5] The Union's inconsistent use of the rat balloon, and its use of another attention-getting device (the Uncle Sam balloon) as well, indicate that the Union likely did not intend to create an invisible "picket line" that people would not cross, but rather intended to draw attention to its handbilling activity.

Third, it is clear that the Union did not intend to induce employees to withhold services, a usual purpose of "picketing." In addition to the disclaimer on the handbills, the Union made no efforts to interfere with deliveries or induce a cessation of work by employees. Indeed, there is undisputed evidence that, when a single deliveryman refused to make a delivery, the Union telephoned the driver's employer to give assurances that the delivery should be made and it was.

Finally, the Union has not engaged in this type of conduct since November 2003, and there is no indication that it plans to resume this activity. In all these circumstances, we conclude that the Region should dismiss the charge absent withdrawal.

B.J.K.

---

[5] See Construction and General Building Laborers Local 79 (C&D Restoration, Inc.), Case 2-CP-1036-1, Advice Memorandum dated August 15, 2003, at p. 9, n.18 (union's use of inflated skunk not a factor in finding that union engaged in unlawful picketing; skunk has no significance in labor context and therefore its mere display does not operate as a signal to employees or passersby to take any particular action).